NEW LEGISLATION & NEW CASES REVIEW FOR 2012

This year was an active year for new legislation impacting Common Interest Developments. The long anticipated revision of the Davis-Stirling Common Interest Development Act ("Act") was passed by the Legislature in August 2012, and will be effective on January 1, 2014. There were also several changes to the Act in 2012.

I. New Legislation

A. SB 880 (Corbett) -- Urgency Legislation effective 2/29/2012 – Electrical charging stations - Amended Civil Code §§ 1353.9 and 1363.07.


2. "Clean up" of SB 209, which was enacted effective January 1, 2011.

3. The initial version did not specify where the electric vehicle charging station ("charging station") may be located. Civil Code § 1363.9 now states that a charging station must be located in the owner’s deeded, designated or assigned parking space.

4. Clarifies that the association may make reasonable restrictions concerning the installation and use of charging stations.

5. Adds a provision that installation of a charging station for the exclusive use of an owner in a common area that is not exclusive use common area shall be authorized by the association only if installation in the owner's designated parking space is impossible or unreasonably expensive. In such cases, the association shall enter into a license agreement with the owner for the use of the space in a common area.
6. Allows the installation of a charging station in the common area for the use of all owners. In such a case, the association shall develop appropriate terms of use for the charging station. The new subsection also allows an Association to create new parking spaces where none previously existed to facilitate the installation of a charging station.

7. Amends Section 1363.07, relating to grants of exclusive use of common area, to give boards authority to grant an owner's request to install and use a charging station in the owner's garage or parking space without approval of the members even if the charging station requires reasonable access through the common area for utility lines or meters, and to install and use a charging station through a license granted by an association under Section 1353.9.

B. AB 1838 (Calderon) and AB 2697 (Housing Omnibus Act).

1. AB 1838 – Cancellation fees for document requests; form for disclosure fee estimates – Amends Civil Code §§ 1368 and 1368.2.
   a. Prohibits associations from collecting a cancellation fee for the documents requested as described in Section 1368(a) if the cancellation was requested in writing by the person who placed the order.
   b. Requires associations to refund all fees collected pursuant to § 1368 (b)(1), permitting collection of a reasonable fee based on the actual cost for the procurement, preparation, reproduction and delivery of the documents requested, if the request was canceled in writing and the work on the order had not yet been performed. If the request was canceled in writing, the association must refund the share of the fees collected that represents the portion of the work not performed on the order.
   c. Amends §1368.2 to require that the form for billing disclosures estimating the costs for document requests be in at least 10-point font.

2. AB 2697 – Amends Civil Code §§ 1363.05 and 1368.
   a. Amends § 1363.05 related to telephonic open board meetings. Currently, a board may hold an open meeting by teleconference (meaning a majority of the board is present by telephone) only if one board member is present at a location where members of the association may also attend.
Beginning January 1, 2013, at least one member of the board, or a person designated by the board, must be present at that location.

b. Amends Civil Code § 1368 to eliminate an owner’s obligation to describe how a leasing or renting prohibition is applied, as contained in the governing documents, to a prospective purchaser.


a. When AB 805 becomes effective on January 1, 2014, it will repeal every provision of the Davis-Stirling Act except those affected by AB 1838 and AB 2697. Therefore, the reorganized Davis-Stirling Act does not include the changes made by AB 2697 and 1838.

b. To correct the problem, AB 1838 and AB 2697 will need to be specifically repealed by clean up legislation, and/or the new Davis-Stirling Act will need to be amended to incorporate the changes made by AB 1838 and AB 2697.

C. **AB 2273 (Wieckowski) – Recording of Trustee's Deeds – Adds § 2924.1 and amends § 2924b of the Civil Code.**

1. Provides that if a property is sold pursuant to a power of sale in a deed of trust or mortgage, the transfer deed must be recorded within 30 days after the date of sale.

   a. There is no penalty for a failure to record the deed.

   b. Any failure to comply with § 2924.1 shall not affect the validity of the trustee's sale, or any sale to a bona fide purchaser.

2. Amends Civil Code § 2924b to provide that if an association has recorded a request for copies of trustee's deeds, the deed must be mailed to that association within 15 days after the date of the sale rather than within 15 days after the deed is recorded.

   a. There is no penalty for failure to mail the deed to the association.

   b. The Request for Notice may be a "blanket" notice; it must include a legal description or assessor's parcel number of all of the separate interests.
D. **AB 1720 (Torres) – Private investigators’ entry into development – Amends § 415.21 of the Code of Civil Procedure.**

1. Currently, gate personnel must allow sheriffs and registered process servers into the community upon identifying the individual to be served and showing identification and a badge or proof of current registration as a process server. This law adds private investigators to the list of people who must be granted access into the community for service of process or a subpoena.

2. The private investigator must identify the individual to be served, and show his identification and evidence of licensure as a private investigator.

E. **AB 2114 – Swimming Pool Safety - Technical updates/amendments to Health & Safety Code §§ 115921, 115928, 115928.5, 116064 and 116064.2.**

1. Updates current swimming pool safety standards to include the latest standards, technology and terminology. For example, current law uses the terms "drains," "main drain" and "suction," but these terms are misnomers. The correct terminology is either a "suction outlet" or "circulation system." Clarifies that a public pool can be constructed using alternative methods of conducting water to the circulation pump such as skimmers or perimeter overflow systems so long as such systems comply with the water turnover requirements.

2. Updates the California Virginia Graeme Baker (VGB) statute to require that suction outlet grates must meet the ANSI/APSP-16 standards or any successor standards adopted by the Consumer Products Safety Commission.

3. Association pool contractors should be aware of new technical requirements for installation of suction outlets and circulation pumps when they retrofit, or construct, new pools/spas.

II. **AB 805/AB 806 (TORRES) - REWRITE OF THE DAVIS-STIRLING COMMON INTEREST DEVELOPMENT ACT – EFFECTIVE JANUARY 1, 2014.**


B. AB 805 completely reorganized and renumbered the Davis-Stirling Common Interest Development Act and relocates the Act to a different part of the California Civil Code. Currently, the Act is found in Civil Code §§ 1350-1378. The new Act will be found in Civil Code §§ 4000-6150.
C. AB 806 updates the many references to the Act in other statutes, e.g., the Vehicle Code, to refer to the new statute numbers.

D. The new Act goes into effect on January 1, 2014.

E. Background:

1. In 2000, the Legislature authorized the California Law Revision Commission ("CLRC") to conduct a general study of the laws governing common interest developments.

2. In 2011, CLRC recommended to the Governor and the Legislature that the Davis-Stirling Act be repealed and replaced with a new statute that would continue the substance of existing law but in a more logical and user-friendly form:
   a. Related provisions would be grouped together in a logical order, making relevant law easier to find and use.
   b. It would also provide a clear organization to guide the future development of the law.
   c. Sections that are unclear or confusing would be revised for clarity, without any change to their substantive effect.
   d. Sections that are excessively long would be divided into shorter sections.
   e. To the extent practical, terminology would be standardized.
   f. Various noncontroversial substantive improvements would be made.

3. Although the CLRC's stated intention was to avoid substantive changes in reorganizing the Act, there are some important changes to the current Act. Further, the CLRC has indicated that more substantive changes to the Act will be explored in the future.

4. "Clean up" legislation is expected during 2013 to address editing errors, but not major substantive changes.

The CLRC is considering amendments to the Act related to commercial and industrial common interest developments, and has indicated that it may explore modifications to make small associations exempt from some provisions of the Act.
III. FHA APPROVAL GUIDELINE MODIFICATIONS.


2. The changes will expire on August 31, 2014, unless extended.

B. The major changes to the HUD/FHA approval requirements ("Guidelines") include:

1. **Delinquencies**: No more than 15 percent of the total units may be more than 60 days delinquent in payment of regular assessments (not including late charges, interest, collection charges, etc.). The Guidelines previously used 30 day delinquency.
   a. The 15 percent limitation includes all units in the project whether vacant, bank owned, rented, etc.
   b. FHA will not consider any exceptions to this standard.

2. **Employee Dishonesty Insurance**: All condominium projects with more than 20 units must obtain and maintain "fidelity bond/fidelity insurance" – also known as "Employee Dishonesty" or "Commercial Crime Insurance" ("Employee Dishonesty Insurance") - as follows:
   a. The association’s policy must cover all officers, directors and employees of the association, all other persons handling or responsible for funds administered by the association, in a coverage amount of no less than three months assessments on all units plus reserve funds (unless state law mandates a maximum dollar amount of required coverage; California does not).
   b. If the condominium project has a management company one of the following requirements must be met showing that Employee Dishonesty Insurance is in place for the management company's officers, employees and agents handling or responsible for association funds: the management company has its own Fidelity Bond/Employee Dishonesty coverage that meets FHA association coverage requirements; or the association’s Employee Dishonesty Insurance policy specifically names the management
company as an agent or insured; or the association’s Employee Dishonesty Insurance policy includes a "covered employee" endorsement that states that a person employed by the management company performing services subject to the direction and control of the association is covered under the association's Employee Dishonesty policy.

3. **Project Certification:** FHA Guidelines will now require that the individual submitting the application for approval certify that:

   a. To the best of his/her knowledge and belief the information in the condo project application is true and correct;
   
   b. That signer has reviewed the application and it meets all current FHA condominium approval requirements; and
   
   c. The signer has no knowledge of circumstances or conditions that may have an adverse impact on the condominium project (including, but not limited to, construction defects, substantial operational issues, or litigation, mediation, or arbitration issues).

4. The Project Certification must still be submitted on letterhead, and must be signed by an authorized representative of the association, defined as the management company, a board member, project consultant or attorney. The federal statutory penalties for submitting false, fictitious or fraudulent statements to any federal entity is a fine of not less than $1,000,000 or imprisonment for not more than 30 years or both (18 USC 1014 and other federal criminal statutes).

**NEW CASES IN 2012**

*Pinnacle Museum Tower Assn. v Pinnacle Market Development*  
*(2012) 55 Cal. 4th 223*

In this case, the California Supreme Court ruled that a provision requiring arbitration of construction defect claims, written into CC&Rs by the developer before the association came into existence, is enforceable. As a result, the Association was required to arbitrate its construction defect claims based on the requirement in its CC&Rs. The CC&Rs required arbitration under the Federal Arbitration Act. The Supreme Court noted that that act favors arbitration. Even though the Association did not agree to arbitration, as a party to a contract would, the CC&Rs are enforceable just as a contract would be, under the Davis-Stirling Act. The Davis-Stirling Act also allows an association to pursue some defect claims on behalf of its owners. Therefore, according to the Court, it is not unreasonable for the CC&Rs to bind an association to an arbitration clause. It is not "procedurally unconscionable" because the
developer followed all of the requirements imposed by law. Nor was the arbitration provision in this case unusually harsh or one sided, so it was not "substantively unconscionable."

**Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.**  

The Davis-Stirling Act (at Civil Code section 1368.3) grants a community association standing to sue for damage to common area. This case clarified that associations have standing to assert claims against parties that had no direct dealings with the Association. The Association was permitted to bring claims for fraud, unfair business practices and breach of fiduciary duty against the real estate agents for the developer. The agents sold the lots to the individual owners, and had no direct dealings with the Association. The agents allegedly withheld information that a soils report was invalid, and these omissions resulted in the need for the Association to make repairs and investigate soils conditions. The investigation and repair costs constituted damage to common area, sufficient to allow the case to proceed.

**That v. Alders Maintenance Assn.**  

Civil Code 1363.09 governs attorneys' fees and costs in actions to enforce members' rights under the election and meeting provisions of the Davis-Stirling Act. It states that a "prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable or without foundation." Homeowner That sued his association for failing to adjourn a special meeting to remove the board to a later date, even though no one made a motion to do so. The Association prevailed. However, even though the judge found the homeowner's case to be frivolous, the Court of Appeal held the association could not recover attorneys' fees. The statute's language, according to the Court of Appeal, provided recovery of costs (which generally consist of filing fees, deposition costs, and the like), and not attorneys' fees.

**Quail Lakes Owners Assn. v. Kozina**  
(2012) 204 Cal. App. 4th 1132

Kozina challenged the trial court’s decision to grant a Civil Code Section 1356 petition reducing the approval requirements needed for the association to amend its CC&Rs. In connection with the petition, the trial court established a schedule for the Association to give notice of the petition to its members and for any written opposition by the members to be submitted to the court. Kozina asserted the trial court’s schedule violated the Association members’ due process rights by not giving them enough time to submit an opposition. But the Court of Appeal noted that Kozina had sufficient time to submit an opposition, and ruled that Kozina did not have standing to assert that the order violated the due process rights of other members.

**Silk v. Feldman**  
(2012) 208 Cal. App. 4th 547

Board candidate Feldman accused his opponent, Silk, of buying parking spaces for only $10.00, although they were being sold by the developer (as part of the settlement of a lawsuit) for $19,000. He also accused her of overseeing the lawsuit, while on the board, so she could secure a favorable deal on parking spaces. Silk sued Feldman for defamation, and Feldman filed an
anti-SLAPP motion asserting Silk's defamation lawsuit was an impermissible attempt to thwart his right to free speech. In opposing the motion, Silk filed declarations saying that she did not control the developer suit, the decisions about the suit were made by the entire board, she was not on the board when she bought the parking spaces, the spaces were offered to all members, and she paid full price. Based on this evidence, the trial court found that Feldman was not likely to prevail because the statements he made were false. The trial court denied the anti-SLAPP motion and allowed Silk to proceed with her case. The Court of Appeal affirmed the decision, stating: "Not all speech is free. Here, speech can be costly."

**PV Little Italy LLC v. MetroWork Condominium Assn.**  

This case deals with a complicated set of transactions following loan defaults by the initial developer of a mixed use project. It addresses whether the original developer, the successor to the developer, or neither, held the Declarant's favorable Class B voting rights. Based on the nature of the transactions and the language in the CC&Rs, the Court of Appeal held that the developer's successor, which acquired units following a foreclosure and subsequent transfers, had the right to exercise Class B voting rights. The lesson: An association faced with determining if any entity may take advantage of the rights of the Declarant under the CC&Rs should consult with legal counsel, and be prepared to deal with a complicated issue.


The court held that a plaintiff can recover emotional distress damages for injury to plaintiff's pet dog, under a theory of trespass to personal property. Previously, a pet owner was limited, in most cases, to the vet bills, or the monetary value of the dog. This case involves a neighbor to neighbor dispute, and, ultimately, to a lawsuit by plaintiff Plotnik, alleging a number of causes of action against his neighbors, the Miehauses. Evidence at the trial showed that Miehaus hit Plotniks' 15 pound miniature Pinscher, Romeo, with a baseball bat, alleging he felt threatened. Romeo required veterinary care and had to use a scooter for a period of time as a result. The jury found for Plotniks on most causes of action, including a cause of action for trespass to chattel in connection with the injury to Romeo. In addition to the vet bills, the jury awarded emotional distress damages. In its most significant holding the Court of Appeal allowed the emotional distress damages, under the rule that tort damages should compensate for all detriment proximately caused by the wrongful act. The court distinguished cases declining to award such damages for negligent injury to a dog. It also compared the cause of action for trespass to chattel to actions for trespass to real property, where emotional distress damages have been allowed. The case increases potential liability to associations for failure to control vicious dogs, which may attack and injure other dogs.

The jury could have concluded that the conduct of the Miehaus' sons were outrageous, and constituted intentional infliction of emotional distress.

Emotional distress damages were properly awarded for breach of the settlement agreement, because such distress was the likely result of the breach of that contract.
This case is an example of neighbors finding a way to litigate their dispute without dragging the association in on a claim of failure to enforce against troublesome conduct. It is also an example of why one might not want to appeal every case.

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